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US Agency for International Development  
Chief Privacy Officer  
1300 Pennsylvania Avenue, NW  
Room 2.12-003  
Washington DC 20523-2120

Re: RIN 0412-AA61  
Citation: 72 FR 39768  
Document ID: AID-2007-0007-0002, Privacy Act of 1974, Implementation of Exemptions

## I. INTRODUCTION.

This letter is in response to the above referenced rulemaking action published by the United States Agency for International Development ("USAID"), proposing to exempt portions of the "Partner Vetting System" (the "PVS") from the Privacy Act of 1974, 5 USC § 552a (the "Privacy Act") for the purpose of coordination "with law enforcement and intelligence agencies as well as use their information" to prevent US Government funds from purposeful or inadvertent support of those engaged in or associated with terrorism. USAID is seeking to establish and maintain a record system exempt from significant protections of the Privacy Act, including the protections of (a) adequate access to the records; (b) the ability to amend or correct inaccurate, irrelevant, untimely and incomplete records; (c) to share records with third parties without providing notice of the sharing to the subject-individual; and (d) limiting the type of information collected and maintained.

Mercy Corps works amid disasters, conflicts, chronic poverty and instability to unleash the potential of people who can win against nearly impossible odds. Since 1979, Mercy Corps has provided \$1.3 billion in assistance to people in 100 nations. Supported by headquarters in North America, Europe, and Asia, the agency's global programs employ 3,400 staff worldwide and reach 14.4 million people in more than 35 countries. Over the past five years, 90 percent of the agency's resources have been used for programs that help people in need.

USAID published notice of the creation and implementation of the PVS in the Federal Register, Vol. 72, No. 136, Tuesday July 17, 2007 (the "PVS Notice"). For the reasons set forth below, Mercy Corps urges USAID to reconsider the proposed rulemaking and withdraw the action. If after a full review process pursuant to Executive Order 12866 as amended by Executive Orders Nos. 13258 and 13422 (collectively, EO 12866) and the Congressional Review Act, 5 USC §§ 801, *et seq.* USAID is able to provide adequate evidence that the current measures in place are ineffective, only then should USAID be permitted to implement the PVS in a more limited form.



## II. SPECIFIC COMMENTS.

### A. Privacy Act.

When it enacted the Privacy Act in 1974, Congress sought to restrict the amount of personal data that federal agencies could collect and required agencies to be transparent in their information practices.<sup>1</sup> In 2004, the Supreme Court underscored the importance of the Privacy Act's restrictions upon agency use of personal data to protect privacy interests, noting that:

"[I]n order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary...to regulate the collection, maintenance, use, and dissemination of information by such agencies." Privacy Act of 1974, §2(a)(5), 88 Stat. 1986. The Act gives agencies detailed instructions for managing their records and provides for various sorts of civil relief to individuals aggrieved by failures on the Government's part to comply with the requirements."<sup>2</sup>

The Privacy Act is intended to "promote accountability, responsibility, legislative oversight and open government with respect to the use of computer technology in the personal information systems and data banks of the Federal Government."<sup>3</sup> It is also intended to guard the privacy interests of citizens and lawful permanent residents against government intrusion. Congress found that "the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies,"<sup>4</sup> and recognized that "the right to privacy is a personal and fundamental right protected by the Constitution of the United States." It thus sought to "provide certain protections for an individual against an invasion of personal privacy" by establishing a set of procedural and substantive rights.<sup>5</sup>

Adherence to Privacy Act requirements is critical for a system such as the PVS, which seeks to vet a large number of people associated with NGOs as a prerequisite to those organizations being able to access critical public funding. Shockingly, USAID proposes to exempt the PVS from key fair information practices, such as the requirements that an individual be permitted access to personal information, that an individual be permitted to correct and amend personal information and that an agency assure the reliability of personal information for its intended use. It is inconceivable that the drafters of the Privacy Act would have permitted a federal agency to propose a secret vetting system and be granted broad exemptions from Privacy Act obligations.

#### 1. The PVS's Broad Exemptions Contravene the Intent of the Privacy Act.

USAID has invoked 5 USC §552a(k)(1), (k)(2), and (k)(5) as authority for its exemption from specific Privacy Act requirements. These broad exemptions would also enable USAID to use the PVS with little accountability.

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<sup>1</sup> S. Rep. No. 93-1183 at 1 (1974).

<sup>2</sup> *Doe v. Chao*, 540 U.S. 614, 618 (2004).

<sup>3</sup> S. Rep. No. 93-1183 at 1.

<sup>4</sup> Pub. L. No. 93-579 (1974).

<sup>5</sup> *Id.*



*5 USC §552a(k)(1).* 5 USC §552a(k)(1) provides that an agency may exempt from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order." Executive Order 12958 is the current Executive Order that provides for the classification, declassification and safeguarding of national security information. When properly classified under this Executive Order, national security information is exempt from mandatory disclosure under the Privacy Act exemptions. However the information maintained in the PVS would not be properly classified under Executive Order 12958.

Under Executive Order 12958, as amended, information may not be considered for classification unless it concerns: (a) military plans, weapons systems, or operations; (b) foreign government information; (c) intelligence activities (including special activities), intelligence sources or methods, or cryptology; (d) foreign relations or foreign activities of the United States, including confidential sources; (e) scientific, technological, or economic matters relating to the national security, which includes defense against transnational terrorism; (f) United States Government programs for safeguarding nuclear materials or facilities; (g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security, which includes defense against transnational terrorism; or (h) weapons of mass destruction. The proposed PVS is likely to contain information that does not fall under even one of these categories and by claiming a 5 USC §552a(k)(1) exemption, USAID will step beyond its authority to classify information as secret.

*5 U.S.C. § 552a(k)(2).* This section exempts "investigatory material compiled for law enforcement purposes... provided, however, that if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence." This exemption covers: (1) material compiled for criminal investigative law enforcement purposes, by nonprincipal function criminal law enforcement entities; and (2) material compiled for other investigative law enforcement purposes, by any agency. The material must be compiled for some investigative "law enforcement" purpose, such as a civil investigation or a criminal investigation by a nonprincipal function criminal law enforcement agency. None of USAID programs or policies claims that to have a "law enforcement" purpose. An agency that does not have a "law enforcement" purpose does not have the authority to claim this exemption and by claiming a 5 USC §552a(k)(2) exemption, USAID will step beyond its authority and agency purpose.

*5 USC 552a(k)(5).* This section provides a specific exemption under the Privacy Act for information compiled solely for the purpose of determining suitability, eligibility or qualification for Federal employment, military service, Federal contracts or access to classified information, the exemption only applies where required disclosure would reveal a source of the information. In this instance, the NGO community as the employer of the subject individuals is the primary source of the information about the subject-individuals. The employees of the NGOs will know that their employer is the source of the information. The very limited exception at 552a(k)(5) does not support USAID's wholesale request for exemption under the Privacy Act to (a) preclude the subject-individuals from access to the information in their record; or (b) limiting the information maintained in the PVS to that information relevant and necessary to accomplish the purpose of the agency. As compliance with this rule may result in the loss of



a job, the failure to allow access by the individual to their record to review at least the accuracy of the information contained therein, to correct incorrect information, and to confirm that the information had been associated with the correct individual could have devastating personal consequences. Such a process directly contradicts the fundamental transparency which is at the heart of the Privacy Act, as well as analogous federal privacy laws in other sectors, such as the Fair Credit Reporting Act, 15 USC §1681 *et seq.*

## **2. The PVS Fails to Provide Meaningful Citizen Access to Personal Information and Opportunities to Correct Inaccurate, Irrelevant, Untimely and Incomplete Information.**

In this notice, USAID proposes exempting the PVS from all Privacy Act provisions guaranteeing citizens the right to access records containing information about.<sup>6</sup> Companion and complementary to the right to access information is the right to correct it.<sup>7</sup> USAID proposes exempting the PVS from the Privacy Act requirements that define the government's obligation to allow citizens to challenge the accuracy of information contained in their records.

The rights of access and correction were central to what Congress sought to achieve through the Privacy Act:

"The committee believes that this provision is essential to achieve an important objective of the legislation: ensuring that individuals know what Federal records are maintained about them and have the opportunity to correct those records. The provision should also encourage fulfillment of another important objective: maintaining government records about individuals with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to individuals in making determinations about them."<sup>8</sup>

USAID is proposing to establish a system that provides neither adequate access nor the ability to amend or correct inaccurate, irrelevant, untimely and incomplete records. Because USAID "cannot confirm or deny whether an individual 'passed' or 'failed' screening," it is unknown how a person or organization would know that there is incorrect information in the PVS. USAID is creating a system that can neither be accessed by the Privacy Act for inspection nor can it be accessed to determine if it includes an individual's record. This secrecy conflicts with the purposes of the Privacy Act, which was intended to provide an enforceable right of access to personal information maintained by government agencies.

## **3. The PVS Fails to Assure Collection of Information Only for "Relevant and Necessary" Use.**

USAID also seeks to exempt the PVS from the fundamental Privacy Act requirement that an agency "maintain in its records only such information about an individual as is relevant and necessary"<sup>9</sup> to

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<sup>6</sup> 5 USC §552a(d)(1)

<sup>7</sup> 5 USC §552a(d)(2)-(4)

<sup>8</sup> H.R. Rep. No. 93-1416 at 15 (1974).

<sup>9</sup> 5 USC §552a(e)(1)



achieve a stated purpose required by Congress or the President. USAID has not explained why it would be desirable or beneficial to maintain information in the PVS that is irrelevant and unnecessary.

Such open-ended data collection plainly contradicts the objectives of the Privacy Act and raises serious questions concerning the likely impact of the PVS on the NGO community and the millions of people which the NGOs serve worldwide. In adopting the Privacy Act, Congress was clear in its belief that the government should not collect and store data without a specific, limited purpose. The "relevant and necessary" provision:

"reaffirms the basic principles of good management and public administration by assuring that the kinds of information about people which an agency seeks to gather or solicit and the criteria in programs for investigating people are judged by an official at the highest level to be relevant to the needs of the agency as dictated by statutes... This section is designed to assure observance of basic principles of privacy and due process by requiring that where an agency delves into an area of personal privacy in the course of meeting government's needs, its actions may not be arbitrary."<sup>10</sup>

As the Office of Management and Budget noted in its Privacy Act guidelines, "the authority to maintain a system of records does not give the agency the authority to maintain any information which it deems useful."<sup>11</sup> The Privacy Act's "relevant and necessary" provision thus seeks to protect individuals from overzealous, arbitrary and unnecessary data collection. It embodies the common sense principle that government data collection is likely to spiral out of control unless it is limited to only that information which is likely to advance the government's stated (and legally authorized) objective. The exemption from the "relevant and necessary" requirement will serve only to increase the likelihood that the PVS will become a repository of a broad range of information and identify individuals bearing no relation to USAID's stated goal for the PVS.

#### **4. The PVS Could Potentially Collect Information on How Individuals Exercise First Amendment Rights.**

As secrecy surrounding the PVS increases with each exemption from the Privacy Act, questions arise as to whether USAID's information-gathering will violate the First Amendment of the US Constitution, specifically, violating the rights of freedom of religion and association. The Privacy Act clearly states that agencies cannot maintain any records "describing how an individual exercises rights guaranteed by the First Amendment" unless: (1) a separate statute authorizes the agency to maintain the records; (2) the individual authorizes the agency to maintain the records; or (3) the records are maintained "pertinent to and within the scope of an authorized law enforcement activity."<sup>12</sup>

With the exemptions sought by USAID, the PVS will become a secret list that the public and subjects on the list will not have access to and therefore have no way of knowing the basis for an individual being placed on the list. It is highly likely that a name may be placed on the PVS list due to membership in certain religious organizations and communities. For example, if the PVS maintained names of individuals who were only exercising their right to freedom of religion by joining a local mosque, the First Amendment will clearly be violated. Because of the lack of transparency created by USAID claiming Privacy Act exemptions, there is no way to verify that such violations have or have not occurred.

<sup>10</sup> S. Rep. No. 93-3418 at 47 (1974).

<sup>11</sup> Office of Management and Budget, *Privacy Act Implementation: Guidelines and Responsibilities*, 40 Fed. Reg. 28948, 28960 (July 9, 1975).

<sup>12</sup> 5 USC §552a(k)(7)



The PVS could also violate NGO's, such as Mercy Corps', right to freedom of association by demanding detailed information regarding directors, employees, and subgrantees. The privacy of personal information obtained by NGOs is particularly important, as the Supreme Court has made clear that this information is protected by the First Amendment right of association. In *NAACP v. Alabama*<sup>13</sup>, as part of its strategy to enjoin the NAACP from operating, Alabama required it to reveal to the State's Attorney General the names and addresses of all the NAACP's members and agents in the state. The unanimous Supreme Court held that a compelled disclosure of the NAACP's membership lists would have the effect of suppressing legal association among the group's members and that organizations have a constitutional right to keep their membership information private. The Court stated, "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute an effective restraint on freedom of association. There is a vital relationship between freedom to association and privacy in one's associations. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association."<sup>14</sup> The constitutional right of privacy thus requires that great care be taken in preserving the privacy safeguards afforded to organizations by the Privacy Act. Because USAID has not provided any evidence that current measures in place are ineffective, has not narrowly tailored the PVS, nor has attempted to follow statutory and administrative guidelines regarding rulemaking of this nature, it has failed to take the level of care necessitated by the First Amendment.

#### **B. USAID has not complied with Executive Order 12866.**

Almost all executive branch agencies, including USAID, are subject to Executive Order 12866, as amended. As required by the order, before a regulation can go on the books, USAID must:

- Assess the general economic costs and benefits of all regulatory proposals;
- For every "major" rule, complete a Regulatory Impact Analysis ("RIA") that describes the costs and benefits of the proposed rule and alternative approaches, and justifies the chosen approach;
- Submit all "major" proposed and final rules to OMB for review;
- Wait until OMB completes its review and grants approval before publishing proposed and final rules;
- Submit an annual plan to OMB in order to establish regulatory priorities and improve coordination of the Administration's regulatory program. This requirement also applies to the independent agencies; and
- Periodically review existing rules.

A major rule, as designated by OMB is any rule that is likely to result in: (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets; or (4) any rule designated by OMB as "Significant."<sup>15</sup>

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<sup>13</sup> 357 U.S. 449 (1958).

<sup>14</sup> *Id.* at 1172.

<sup>15</sup> Congressional Review Act of 1996, also known as the Small Business Regulatory Enforcement Fairness Act.



OMB has defined "Significant" as action that is likely to: (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a section of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (actions that meet this criterion are "economically significant"); (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in EO 12866.<sup>16</sup>

We believe the adoption of the PVS constitutes a "major" rule requiring EO 12866 compliance because such action will (1) materially alter the budgetary impact of grants by significantly reducing the amount of grants issued as many organizations may be barred from receiving grants and (2) raise novel legal issues arising out of legal mandates, namely the Privacy Act and EO 13224. Therefore, EO 12866 compliance is required and USAID is in violation of such order.

"The objectives of [EO 12866] are to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public."<sup>17</sup> To ensure that these noble objectives are met, we urge USAID to follow the process detailed above.

### C. Congressional Review Act, 5 USC §§ 801 et seq.

USAID maintains that the PVS is not a major rule subject to Congressional review pursuant to the Congressional Review Act, 5 USC §§ 801 *et seq.* (the "CRA"). Congress intended the CRA to be interpreted broadly, both as to type and scope of rules covered.<sup>18</sup> The entire focus of the CRA is to require Congressional review of agency actions that substantially affect the rights or obligations of outside parties and to assure that federal agencies are more cautious in how they craft their rules and more observant of objections from members.<sup>19</sup>

Mercy Corps believes that the PVS is both a rule and a "major rule" subject to Congressional review and approval. The PVS falls within the definition of "rule" at 5 USC § 804(3)(C) as it substantially affects the rights and obligations of non-USAID parties by proposing exemptions under the Privacy Act that result in the suspension of an individual's privacy protections and serious potential harm to the work of the NGOs and the employment status of covered individuals.

USAID has unilaterally determined the PVS is not a "major rule." The CRA states that Administrator of OIRA makes a finding as to whether or not a rule is deemed a "major rule" under CRA and thereby subject to Congressional review.<sup>20</sup> . Mere assertion by USAID of the PVS's status is not sufficient to

<sup>16</sup> *Id.*

<sup>17</sup> Preamble of Executive Order 12866.

<sup>18</sup> Whether Department of Veterans Affairs Memorandum is Rule Under Congressional Review Act (2/28/03) Comp. Gen. Dec. No. B-291906 (2003).

<sup>19</sup> 142 Cong. Rec. S3687 (daily ed. Apr. 19, 1996) (Joint Explanatory Statement of Senate Sponsors); 142 Cong. Rec. E579 (daily ed. Apr. 19, 1996) (Joint Explanatory Statement of House Sponsors).

<sup>20</sup> 5 USC §804(2)



claim exemption from the CRA. The PVS should have been submitted to OIRA for determination of whether or not it is subject to Congressional review as a "major rule" pursuant to 5 USC §§ 804(3).

**D. There are Fundamental Problems with Implementing the PVS That Have Yet to be Addressed.**

In addition to the legal arguments surrounding the adoption of the PVS, several questions and concerns arise as we delve into PVS implementation. Suppose the PVS is adopted as is and Mercy Corps applies for a grant. We have been provided no detail about how the PVS will be implemented and therefore cannot accurately assess the burden. What processes and procedures must we create to ensure we properly comply with USAID rules? The lack of detail prevents us from making such a determination. As an employer, how will Mercy Corps submit private information of employees without their consent and avoid legal action? Will more USAID money go to private contracts if many NGOs are unable to receive grant funding due to vetting that is not required of contractors who also obtain USAID funding? These questions must be addressed before any form of the PVS is adopted by USAID.

If Mercy Corps applies for a grant and the grant is denied after vetting the names of board members, employees and subgrantees' through the PVS, the Privacy Act exemptions sought by USAID will prevent Mercy Corps from determining why we did not receive the grant and Mercy Corps will not be able to take remedial action to prevent such denial from repeating. This will completely paralyze our ability to cooperatively work with USAID and receive grant money Mercy Corps needs to help disadvantaged people throughout the world that we serve on a daily basis. It is truly disheartening to see USAID potentially create a structure that could strip NGOs from all USAID grant funding, not be given a reason why or how to remedy the problem and be forced to stop serving the many that depend on NGOs receiving USAID funding.

**E. Practical Implications of the PVS will Cause Severe Detrimental Effects to NGOs, its Employees, and Those Served by NGOs.**

Another major issue is the safety for Mercy Corps employees abroad. Our employees are able to safely work in areas of conflict because many local leaders and communities in such areas trust and are willing to work with our employees because they do not see us as an arm of the U.S. government law enforcement. As we understand the reporting requirements under the PVS, we will be required to constantly monitor those we work with and receive USAID funding *and* report suspected "terrorist" to USAID. Once local leaders and communities become aware that our employees are required to report local activities to the U.S. government, our employees will lose any trust built and concern for safety rises exponentially. While we see the significant need for Mercy Corps to help in areas of major conflict, we cannot knowingly send employees into communities where they are not only unsafe, but also targeted because of USAID's reporting requirements.

**III. CONCLUSION.**


USAID has not followed the applicable rule-making processes and has not demonstrated a compelling need to assume the mantle of US law enforcement agencies. If the PVS becomes a final rule, the consequences will be dire for the NGO community and the individuals associated with them. If implemented, the Partner Vetting System will unnecessarily hinder Mercy Corps' ability to provide humanitarian aid and democracy-building social infrastructure around the world. For these reasons and



those proffered in our first set of comments, we urge USAID to withdraw the PVS and to engage in appropriate rule-making processes and review.

Sincerely,

**MERCY CORPS**

By:   
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Its: Chief Executive Officer

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